Federal Habeas Corpus and Systemic Official Misconduct: Why Form Trumps Constitutional Rights

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I. INTRODUCTION

When Debra Milke learned her four-year-old son had been murdered, she was sitting in a medical office in the Pinal County Sheriff's Department.[1] At the end of her interview with Detective Armando Saldate, Jr., she supposedly confessed to having her son killed by two men: James Styers and Roger Scott.[2] The prosecution's case rested on the unwritten, unsigned, unrecorded, and unwitnessed confession based on Detective Saldate's testimony.[3] Despite her pleas of innocence, a jury convicted her, and a judge sentenced her to death.[4] Thirteen years later, the Ninth Circuit Court of Appeals granted her a conditional writ of habeas corpus based on prosecutorial misconduct that occurred in her trial.[5] While the Ninth Circuit found the actions of the Maricopa County Prosecutor's Office and Phoenix Police Department constitutionally egregious, it could only grant her relief if it found the state court decisions failed to reasonably apply the *Brady v. Maryland* doctrine in all of its rulings.[6] When the Arizona state courts reviewed Ms. Milke's case on both direct appeal and post-conviction, both courts found *Miranda*[7] and *Brady*[8] challenges were without merit.[9] All federal

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1. *See* Milke v. Schriro, No. CV-98-0060-PHX-RCB, 2006 U.S. Dist. LEXIS 86708, at *14–15 (D. Ariz. Nov. 27, 2006), *rev'd sub nom.* Milke v. Ryan, 711 F.3d 998 (9th Cir. 2013).
2. *See Milke*, 711 F.3d at 1002.
3. *See id.*
4. *See id.*
5. *See id.* at 1019.
6. *See id.* at 1003.
7. Miranda v. Arizona, 384 U.S. 436 (1966) (holding that before custodial interrogations, the

courts were statutorily required to abide by the state court's merits finding so long as it was not an unreasonable use of federal precedent.[10] Such deference, while successful here, often fails when other forms of police or prosecutorial misconduct happen.

The Fourteenth Amendment due process challenges that Ms. Milke made asserting both police and prosecutorial misconduct were not isolated incidents. While she specifically demonstrated how Detective Saldate acted improperly during her interrogation, the Ninth Circuit's opinion discussed the pattern of misconduct the Detective engaged in over several years.[11] The Detective's actions not only placed Ms. Milke on death row, but also affected countless other defendants. When state actors, be they police, prosecutors, or both, behave outside the law, countless defendants are impacted with potentially very little recourse. In many instances, the official misconduct is not pled during a defendant's direct appeal or post-conviction proceedings because it may be unknown. Official misconduct occurs when police or prosecutors violate a person's constitutional rights. However, official misconduct is often not an isolated incident. Instead, systemic official misconduct is seen in various police departments and prosecutors' offices across the country.[12] Systemic official misconduct involves institutionally mandated violations over time.

Over the past few years, courts and state bar associations have paid considerably more attention to the misconduct of police and prosecutors on the state level.[13] Courts are growing more concerned with the systematic impact this misconduct has not only on individual cases, but also on how it undermines the integrity of the criminal justice system.

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police must inform the accused of the right to remain silent, the right to an attorney, and that any statement may be used against him in a court of law).

8. Brady v. Maryland, 373 U.S. 83 (1963) (finding that the prosecution's withholding of evidence favorable to the accused during any phase of a trial is a due process violation).

9. State v. Milke, 865 P.2d 779, 791 (Ariz. 1993); Milke v. Schriro, No. CV-98-0060-PHX-RCB, 2006 U.S. Dist. LEXIS 86708, at *2 (D. Ariz. Nov. 27, 2006), *rev'd sub nom.* Milke v. Ryan, 711 F.3d 998 (9th Cir. 2013).

10. 28 U.S.C. § 2254(d) (2012).

11. *Milke*, 711 F.3d at 1003.

12. *See infra* notes 149–181 and accompanying text for examples of systemic official misconduct.

13. *See generally* Bruce Green & Ellen Yaroshefsky, *Prosecutorial Accountability 2.0*, 92 NOTRE DAME L. REV. 51 (2016) (discussing the evolution of the response to prosecutorial misconduct by the judiciary, public, and state bars); J. Thomas Sullivan, *Brady Misconduct Remedies: Prior Jeopardy and Ethical Discipline of Prosecutors*, 68 ARK. L. REV. 1011 (2016) (examining an Arkansas capital murder case involving prosecutors withholding exculpatory evidence and their referral to the state bar for discipline).

Research has shown that when prosecutorial misconduct is not addressed by courts, the malfeasance increases.[14] Examples of prosecutorial misconduct include withholding exculpatory evidence, making false statements to the court, falsifying evidence, and paying witnesses without disclosing it to the defense, among others.[15] Due to flaws in many state appellate and collateral proceedings, it is difficult for state judges to remedy systemic official misconduct.[16]

The question remains as to what relief exists for inmates in federal habeas corpus when state courts rule on systemic official misconduct constitutional claims. The federal habeas statute requires that an inmate must raise any constitutional violations in either their direct appeal or state post-conviction proceedings for exhaustion purposes.[17] The state must have the first opportunity to rectify any constitutional defects in a state inmate's conviction before a federal court may review the claim.[18] Because an inmate must first present his claims in state court, that inmate should have access to the necessary evidence to substantiate his claims in order for the state court to properly evaluate their merits. However, that rarely happens. Instead, inmates who request access to evidence are often denied, and their constitutional challenges are denied.[19] Such state court merits determinations severely restrict a federal court's review during habeas corpus. Under the Antiterrorism and Effective Death

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14. *See* Harry Mitchell Caldwell, *Everybody Talks About Prosecutorial Conduct but Nobody Does Anything About It: A 25-Year Survey of Prosecutorial Misconduct and a Viable Solution*, 2017 U. ILL. L. REV. 1455, 1458, 1479 (2017) (analyzing a "survey of twenty-five years of California Supreme Court criminal opinions").

15. *See* NAT'L REGISTRY OF EXONERATIONS, EXONERATIONS IN 2016: THE NATIONAL REGISTRY OF EXONERATIONS, 6–7 (2017), https://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2016.pdf (showing that over half of all 2016 homicide exonerations in this country have some form of official misconduct as a contributing factor, and "[f]orty-two percent of exonerations in 2016 included official misconduct (70/166). Official misconduct encompasses a range of behavior—from police threatening witnesses to forensic analysts falsifying test results to child welfare workers pressuring children to claim sexual abuse where none occurred. But the most common misconduct documented in the cases in the Registry involves police or prosecutors (or both) concealing exculpatory evidence. The proportion of exonerations with official misconduct is the highest among homicide cases—more than two-thirds of the homicide exonerations involved misconduct by official actors (42/54).").

16. *See* Aziz Z. Huq, *Habeas and the Roberts Court*, 81 U. CHI. L. REV. 519, 521, 551 (2014) (discussing the lack of effective or any defense counsel in all facets of state criminal proceedings resulting in constitutional violations going unchallenged).

17. *See* Rose v. Lundy, 455 U.S. 509, 515–19 (1982) (discussing Congress's codification of the exhaustion doctrine in the federal habeas statute); Wainwright v. Skyes, 433 U.S. 72, 80–81 (1977) (discussing the exhaustion requirement in state court of constitutional claims and why it is necessary).

18. *See id.*

19. *See* Tiffany Murphy, *The Futility of Exhaustion: Why* Brady *Claims Should Trump Federal Exhaustion Requirements*, 47 U. MICH. J.L. REFORM 697, 708–09 (2014).

Penalty Act (AEDPA), federal courts must give utmost deference when state courts reach the merits of constitutional claims.

Both scholars and judges agree that the AEDPA's deference standard stands as a consistent impediment even when it is obvious that constitutional violations have occurred. For deference to apply to an inmate's constitutional claim, it must have been reviewed on the merits in either direct appeal or collateral review. Upon reaching federal habeas, the district court is statutorily required to evaluate the state court's decision only for an "unreasonable application of clearly established Federal law" and must consider whether "fairminded jurists could disagree."[20] Federal judges are no longer focused on whether an inmate's conviction is constitutionally invalid but instead on whether the state court's ruling had a reasonable legal basis.

The criminal justice system relies on The Great Writ as a legal mechanism to address when state actors unconstitutionally infringe on an inmate's rights.[21] Official misconduct is a classic example of when federal habeas corpus should closely examine the extent of the misconduct and the severity of its impact on an inmate's rights. However, the AEDPA limits federal courts' ability to address the crux of an official misconduct constitutional claim.[22] The deference standard requires a federal judge to determine whether a state court's merits ruling was either "contrary to, or involved an unreasonable application of, clearly established Federal law" or an "unreasonable determination of the facts" when considering the state court evidence.[23] While federal courts are willing to find state court determinations unreasonable if a *Brady* claim is at issue, the same cannot be said for other forms of systematic official misconduct. However, if an inmate's claim asserts other types of official misconduct, a federal court is more apt to find the claim unreachable because of the mandated deference standard.

Debra Milke's case is a classic example of the state court's failure to properly evaluate her claims of police and prosecutorial misconduct before denying them both on the merits and requiring her to try her luck on federal habeas corpus review. Ninth Circuit Court of Appeals Chief

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20. Harrington v. Richter, 562 U.S. 86, 101–02 (2011) (internal quotations omitted) (citing 28 U.S.C. § 2254(d) (2012) and Yarborough v. Alvarado, 541 U.S. 652, 664 (2004)).

21. *See* ANDREA D. LYON ET AL., FEDERAL HABEAS CORPUS xiv (2005).

22. *See* 28 U.S.C. § 2254(d) (2012); *see also* Justin Marceau, *Challenging the Habeas Process Rather than the Result*, 69 WASH. & LEE L. REV. 85, 107–24 (2012) (discussing the impact of various Supreme Court cases on the deference standard of the AEDPA).

23. 28 U.S.C. § 2254(d)(1)–(2) (2012).

Justice Alex Kozinski found several lapses in the state court's evaluation of Ms. Milke's claims when evaluating them under § 2254(d)(1).

> Instead of examining this claim in light of *Giglio*—asking whether the evidence was favorable, whether it should have been disclosed and whether the defendant suffered prejudice—the state court focused on the discoverability of the evidence and the specificity of the claim. This is not the inquiry called for by long-standing Supreme Court caselaw. Because the state court focused on the wrong questions in denying Milke's impeachment-evidence claim, it applied the wrong legal framework. Its decision is thus "contrary to . . . clearly established Federal law" and unworthy of AEDPA deference.[24]

Additionally, he found the state post-conviction court failed to properly evaluate the factual basis of Milke's *Brady* claim, thereby running afoul of 28 U.S.C. § 2254(d)(2).[25] Throughout the Ninth Circuit's discussion of the deference standard, it pointed out the failure of the prosecution to comply with discovery at every level of appeals, including federal habeas corpus. Specifically, the prosecution neglected to fully disclose the scope of Detective Saldate's misconduct in other cases and in internal documentation within the police department.[26] This evidence constituted impeachment evidence that must be disclosed under *Brady* and its progeny.[27] While Milke requested this evidence during her pretrial proceedings, the failure to disclose illustrates the problem of deference which the state appellate and collateral proceedings compounded.[28] Milke's case demonstrates the haphazard review provided in state court when official misconduct is at issue. Further, it shows the extensive evaluation a federal court must have to bypass the deference standard that often prevents it from addressing viable constitutional violations.

This article discusses the substantial issues surrounding the AEDPA's deference standard when an inmate raises constitutional claims of state actors acting improperly. Specifically, federal courts should not give deference to state court merits rulings when based on systemic official misconduct. Often, state courts struggle with applying federal constitutional jurisprudence in collateral proceedings. They fail to permit discovery or evaluate the claims as federal courts have

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24. Milke v. Ryan, 711 F.3d 998, 1006–07 (9th Cir. 2013) (citation omitted).
25. *See id.* at 1007–08.
26. *See id.* at 1010–11.
27. U.S. v. Giglio, 405 U.S. 150, 153–55 (1972).
28. *See Milke v. Ryan*, 711 F.3d at 1004–05.

established is required. Because the pattern of police or prosecutorial malfeasance keeps critical information from the inmate, state actors should not benefit from the AEDPA's intent for high deference to state court findings. This is especially true when state appellate procedure fails to give a full and fair opportunity to develop the claim. Instead, the federal court should review these claims *de novo* or review them under the looser framework of § 2254(d)(2), which is rarely used.[29]

Part Two of this article examines the history of the deference standard as evaluated by various habeas scholars. This discussion focuses on the Supreme Court's problematic interpretation of the deference standard, and examines why the state review process should not be given deference. The third part defines what official misconduct is, the prevalence of that misconduct, and the limitations on state courts in fixing their own mistakes. The fourth section of this article discusses how federal courts should avail themselves of (d)(2) deference review, which provides some means of assessing whether the state proceedings were full and fair. Doing so protects not only the original intent of the Great Writ but ensures the protections of individual rights from unconstitutional overreaching by errant police and prosecutors.

II. DEFERENCE: HOW DID WE GET HERE?

As the *Milke* case illustrates, the deference standard requires any federal court to examine whether a state court's ruling was unreasonable in the application of federal law or of fact before it addresses a claim on the merits. In practice, the deference standard often prevents a federal judge from addressing a constitutional issue on its substance. Unlike most of the Supreme Court-driven changes in the application of the Great Writ, the deference standard was a congressional change.[30] As such, Congress gave little discussion on why it enacted it. Ever since, the Supreme Court and lower federal courts have struggled on what the standard means and how it should be interpreted.

A. Congressional enactment of § 2254(d)

After the Oklahoma City bombing, Congress took the opportunity to streamline what it saw as a litigious and unnecessary slowing down of

29. Under 28 U.S.C. § 2254(d)(2), federal courts review the state court record concerning the factual allegations in ascertaining whether the state court acted unreasonably. Federal courts may consider the applicant's ability to develop the facts under this provision.

30. *See* Marceau, *supra* note 22, at 93.

capital punishment during federal habeas corpus.[31] Many of the changes that the Supreme Court enacted over the last ten years were codified in the new habeas statute.[32] This included the exhaustion requirement, stricter standards for granting evidentiary hearings, and a higher burden of proof for successor petitions.[33] However, the deference standard was an addition not contemplated by federal courts.[34] Instead, Congress added key provisions limiting federal courts from granting writs of habeas corpus by enacting a strict one-year statute of limitations along with the deference standard.[35] In an effort to seize the political moment, several Republicans fast-tracked the bill by limiting commenting and not discussing its impact with federal habeas practitioners or debating with Democrats on the issue.[36] The AEDPA passed both houses by wide majorities and was signed into law by President Clinton in April 1996.[37]

The new deference standard applied only when state courts decided a constitutional claim on the merits.[38] In other words, only when the state court reaches the substantive constitutional issue would a federal court defer to that ruling in federal habeas corpus. "It also requires federal courts to focus on the wisdom, or lack thereof, of a state court's decision

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31. Larry Yackle, *AEDPA Mea Culpa*, 24 FED. SENT'G REP. 329, 330 (2012); Krista A. Dolan, *The § 2254 Trinity: How the Supreme Court's Decisions in* Richter*,* Pinholster*, and* Greene *Have Interpreted Federal Review into Near Nonexistence*, 8 CRIM. L. BRIEF 49, 49–50 (2013).

32. 28 U.S.C. § 2254 (2012).

33. *See* Stephen B. Bright, *Is Fairness Irrelevant?: The Evisceration of Federal Habeas Corpus Review and Limits on the Ability of State Courts to Protect Fundamental Rights*, 54 WASH. & LEE L. REV. 1, 4 (1997) (discussing the passage of and restrictions in the AEDPA).

34. *See* Marceau, *supra* note 22, at 93–97.

35. *See* 28 U.S.C. §§ 2244, 2254(d); *see also* Noam Biale, *Beyond a Reasonable Disagreement: Judging Habeas Corpus*, 83 U. CIN. L. REV. 1337, 1339 (2015) ("Over the last fifteen years, the Supreme Court has interpreted AEDPA to make 'the Great Writ' harder and harder to obtain, despite the fact that habeas petitions remain the primary vehicle for establishing claims of actual innocence, prosecutorial misconduct, and other issues with serious implications for justice.").

36. *See* Yackle, *supra* note 31, at 329 (discussing how quickly the bill was drafted and submitted for a vote without much negotiation).

37. *See* Marceau, *supra* note 22, at 93–94; *see also* Larry Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381, 382 (1996) ("But then I mean to focus primary attention on the provision that has drawn the lion's share of attention, both in Congress and in professional and academic circles. Previously, 28 U.S.C. § 2254(d) governed the effect the federal habeas courts must give to state court findings of historical fact. Pub. L. 104-132 has now reconfigured that section to prescribe the effect the federal courts must give to prior state court judgments on the merits of federal claims[.]").

38. *See* 28 U.S.C. § 2254(d) (2012) ("An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim – (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.").

rather than on the lawfulness of a prisoner's custody, the traditional concern of habeas corpus."[39] Even if a federal judge found a state court decision incorrectly applied federal law, deference to that erroneous decision would still have to apply unless it was unreasonable.

Defining "unreasonable" has become a growing concern for federal courts in applying § 2254(d)(1). As the key provision, the meaning of the term has evolved into a nearly impenetrable wall few state prisoners can surmount.[40] Beginning in *Williams v. Taylor*, the Supreme Court took its first foray into interpreting what an "unreasonable application" was in relation to an ineffective assistance of counsel claim.[41] Specifically, the Court laid out the groundwork that deference to state court decisions should apply as:

> [Those] that do not "conflict" with federal law will rarely be "unreasonable" under either [Justice O'Connor's] reading of the statute or ours. We all agree that state-court judgments must be upheld unless, after the closest examination of the state-court judgment, a federal court is firmly convinced that a federal constitutional right has been violated.[42]

The deference standard is said to not be an absolute bar for federal courts considering state merit decisions.[43] Instead, while preference must be given, federal courts must ascertain whether either the law or the facts were unreasonably evaluated.

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39. Lynn Adelman, *Federal Habeas Review of State Court Convictions: Incoherent Law but an Essential Right*, 64 ME. L. REV. 379, 380, 384 (2012) ("Federal court review of state court convictions serves several important functions. First, when state courts address the merits of a federal constitutional claim, federal courts must determine whether they did so correctly. Second, when state courts do not address the merits of a federal constitutional claim, federal courts must ensure that they have a sufficient reason for not doing so. Thus, just as federal law is supreme, so is federal adjudication of that law as mandated by Congress."); *see also* Alan Chen, *Shadow Law: Reasonable Unreasonableness, Habeas Theory, and the Nature of Legal Rules*, 2 BUFF. CRIM. L. REV. 535, 539 (1999) ("[F]ederal courts offer only the appearance of law, disregarding the reality that law enforcement officials may violate personal constitutional rights of criminal suspects and that state court judges may sometimes under-enforce federal constitutional rights in the often emotionally-charged context of criminal law.").

40. *See* Marceau, *supra* note 22, at 109–10 ("Presently, however, the Court's aggressive interpretation of § 2254(d)(1) serves to ensure that most state prisoners are not eligible for relief despite the fact that their convictions rest on unconstitutional procedures—that is to say, 'an *unreasonable* application of federal law is different from an *incorrect* application of federal law.'").

41. 529 U.S. 362, 409 (2000).

42. *Id.* at 389.

43. *See id.* at 385.

1. The Supreme Court restricts factual development even further.

In *Harrington v. Richter* and *Cullen v. Pinholster*, the Supreme Court expanded the deference given to state court rulings. In *Richter*, the Court held that a state court's summary denial of a constitutional claim was presumed to be a merits determination when considered in federal habeas corpus analysis.[44] If an inmate seeks to rebut this presumption, "a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement."[45] This shift in emphasis stripped away any pretense of examining whether the state courts either on direct appeal or post-conviction applied federal constitutional law correctly as habeas corpus historically required.[46] Instead, form took precedence over substance in deciding whether a conviction was valid. An inmate was now tasked with foreseeing any potential reason for the state court's summary denial and refuting it in order to satisfy the deference standard.

Pinholster narrowed the interpretation of the deference provisions even further. Once again evaluating a constitutional claim for ineffective assistance of counsel, the Court discussed the scope of the record that should be considered when § 2254(d)(1) applied.[47] The opinion limited a federal court's deferential review to the record before the state court at the time of state court's decision.[48] Such a restriction greatly undermined several of the other provisions of the AEDPA, including granting discovery, an evidentiary hearing, or both in ascertaining the validity of the constitutional claim.[49] Additionally, the Court limited

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44. Harrington v. Richter, 562 U.S. 86, 99 (2011).

45. *Id.* at 103; *see also* Biale, *supra* note 35, at 1349; Huq, *supra* note 16, at 541 ("Finally, the petitioner would have to show a valid claim on the merits notwithstanding habeas's nonretroactivity and harmless error rules. In many instances, moreover, the state-court ruling will be summary in nature, containing no legal reasoning. In such instances, the petitioner will have to imagine all possible grounds of decision the state court might have conjured—and refute all of them. Add to this the fact that the petitioner most likely lacks counsel both in the state postconviction context and the federal habeas context. It is hardly surprising that habeas relief rates in this context are vanishingly small.").

46. *See* Huq, *supra* note 16, at 538; *see also* Dolan, *supra* note 31, at 53. Without an opinion, it is virtually impossible for an inmate to show his state court ruling was unreasonable. Additionally, it forecloses the opportunity for an argument to review the case under § 2254(d)(2) as there is no factual discussion in a summary dismissal.

47. Cullen v. Pinholster, 563 U.S. 170, 181–82 (2011).

48. *Id.* at 181.

49. *See id.* at 210 (Sotomayor, J., dissenting); *see also* Murphy, *supra* note 19, at 726–27.

what a federal court could consider as to whether the state court decision was unreasonable.[50]

An unanswered question from the *Pinholster* decision focuses on what happens when an inmate's ability to properly build the record in state proceedings is impeded through an external factor.[51] One example involves official misconduct claims that are difficult to factually develop in state appellate and collateral proceedings for a variety of reasons discussed below. Often, it is only through federal habeas corpus fact development efforts like discovery and evidentiary hearings that the merits of such claims can be fully conceptualized. Prior to *Pinholster*, an inmate could challenge whether state court merits ruling is worthy of deference with these statutory tools. The Court's limitation curtails an inmate's ability to demonstrate the lack of full and fair process under § 2254(d)(1). In other words, a cursory state review may protect official misconduct by state actors by trumping a federal court's power to substantively address that claim. As both cases originated in California, where systematic official misconduct has come to light, they illustrate the devastating impact these cases have on constitutional protections. As described below, the systemic use of jailhouse informants in Orange County, California violated numerous inmates' constitutional rights by impacting their potential ability to prove their innocence, impeach witnesses, or present a meaningful defense.[52]

What a California inmate, who is often acting pro se, faces is an inability to fully explain how a jailhouse informant lied or was placed in his cell by the police or prosecution. Due to his lack of counsel in post-conviction, he does not understand a complex state appellate process, and lacks the funds or assistance for further factual development.[53] Upon entering federal habeas, his opportunity to present additional evidence substantiating the extent of the police and prosecution's interference with a fair trial is blocked. This inmate's case is reviewed under whatever limited record the state court developed. The mandated restriction of the record under review rewards improper behavior by police and

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50. *See Pinholster*, 563 U.S. at 188, 203; *see also Richter*, 562 U.S. at 101 (citing Yarborough v. Alvarado, 541 U.S. 652, 664 (2004)) (discussing that an unreasonableness determination is only appropriate if "fairminded jurists could disagree" regarding the state court decision); Judith L. Ritter, *The Voice of Reason—Why Recent Judicial Interpretations of the Antiterrorism and Effective Death Penalty Act's Restrictions on Habeas Corpus Are Wrong*, 37 SEATTLE U. L. REV. 55, 69–70 (2013).

51. *Pinholster*, 563 U.S. at 212, 212 n.4 (Sotomayor, J., dissenting).

52. *See infra* notes 154–55 and accompanying text.

53. *See* Huq, *supra* note 16, at 521 (discussing the pervasive problem of state courts in failing to provide effective defense counsel who would often spot these claims).

prosecutors despite the state process providing cursory factual development and limited review.

2. The provision often lost in the discussion: Section 2254(d)(2).

Treated almost as an afterthought, § 2254(d)(2) applies in situations where the factual judgments of the state court offend federal precedent. Specifically, the provision requires that:

> [a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim . . . resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.[54]

The Supreme Court's interpretation of (d)(2) requires a federal court to determine the reasonableness of the entirety of the evidence presented in state court.[55] Lower federal courts must consider the totality of the state court record and whether the inmate was prevented from presenting evidence when determining if the state court's decision was objectively unreasonable in light of the constitutional claims precedent on the matter.[56]

Unlike the preceding subsection, § 2254(d)(2) receives much less discussion in case law.[57] It is often interwoven into discussions of whether a federal evidentiary hearing should be granted under § 2254(e)(1).[58] Yet most courts apply § 2254(d)(1) without considering

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54. 28 U.S.C. § 2254(d)(2) (2012).

55. *See* Miller-El v. Cockrell, 537 U.S. 322, 340 (2003) ("[A] decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding.").

56. *See* 1 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 7.1 (7th ed. 2016) (discussing the effect the lack of a full and fair state procedure may have on the federal court's treatment of constitutional claims). Given the Supreme Court's holding in *Pinholster* and *Richter*, § 2254(d)(2) may be the safety valve for inmates challenging the deficiencies of the state court criminal appellate process.

57. *See* Marceau, *supra* note 22, at 94 n.23 (noting "the Court has made no effort to elaborate on the scope and function of the (d)(2) escape hatch").

58. *See* Lambert v. Blackwell, 387 F.3d 210, 235–36 (3d Cir. 2004) ("[T]he relationship between the standards enunciated in § 2254(d)(2) and § 2254(e)(1) remains unclear . . . . Courts have tended to lump the two provisions together as generally indicative of the deference AEDPA requires of state court factual determinations." (citations omitted)). *See also* 28 U.S.C. § 2254(e)(1) (2012) ("In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.").

whether the factual basis of the constitutional claim would be more appropriate under § 2254 (d)(2). Under this provision, an inmate could challenge his ability to develop facts in state court proceedings.[59] Factual determinations are vital for constitutional claims because they provide the crux of the claim and the basis for relief. Without a clear explanation as to how and why the police or prosecutors acted inappropriately, there is no means for any substantive assessment of the extensiveness of the violation.[60] A state's structural flaws may provide an inmate the ability to obtain an evidentiary hearing and remove the deference owed a state court ruling since such avenues are all but closed under § 2254(d)(1).[61] This provision provides a key opportunity for an inmate to articulate the obstructions in discovery, investigation, or other assistance in state direct appeal or collateral proceedings that led to faulty factual findings by the state court.[62] The Supreme Court in two

59. *See* Stephanie Roberts Hartung, *Habeas Corpus for the Innocent*, 19 U. PA. J.L. & SOC. CHANGE 1, 33 (2016); *see also* Taylor v. Maddox, 366 F.3d 992, 999 (9th Cir. 2004); 2 HERTZ & LIEBMAN, *supra* note 56, § 32.4, at 1995–98 (explaining the factors federal courts may use in evaluating reasonableness under § 2254(d)(2), including: "(1) The state court failed to make a factual determination that should have been made; (2) Although the state court made a factual determination, that determination was procedurally unreasonable because, for example: (a) The state court made an evidentiary finding without holding a hearing; (b) Although the state court held a hearing, that hearing was not 'full and fair'; (c) The state court misconstrued or misstated the record or overlooked or misconstrued evidence; (d) The state court applied an erroneous legal standard in making the factual determination; (3) Although the state court made a factual determination and employed an adequate procedure in making that determination, the resulting determination is substantively unreasonable because it is not fairly supported by the 'evidence presented in the State court proceeding.'").

60. *See* Marceau, *supra* note 22, at 117 (noting that "[f]acts are the critical foundation upon which a claim of constitutional defect can rise to the level of 'unreasonableness' as required for federal intervention under § 2254(d)").

61. *See Maddox*, 366 F.3d at 999 ("The first provision—the 'unreasonable determination' clause—applies most readily to situations where petitioner challenges the state court's findings based entirely on the state record. Such a challenge may be based on the claim that the finding is unsupported by sufficient evidence, that the process employed by the state court is defective, or that no finding was made by the state court at all. What the 'unreasonable determination' clause teaches us is that, in conducting this kind of intrinsic review of a state court's processes, we must be particularly deferential to our state-court colleagues. For example, in concluding that a state-court finding is unsupported by substantial evidence in the state-court record, it is not enough that we would reverse in similar circumstances if this were an appeal from a district court decision. Rather, we must be convinced that an appellate panel, applying the normal standards of appellate review, could not reasonably conclude that the finding is supported by the record. Similarly, before we can determine that the state-court factfinding process is defective in some material way, or perhaps non-existent, we must more than merely doubt whether the process operated properly. Rather, we must be satisfied that any appellate court to whom the defect is pointed out would be unreasonable in holding that the state court's fact-finding process was adequate.") (citations omitted).

62. *See* 1 HERTZ & LIEBMAN, *supra* note 56, § 7.1(b), at 395–96 ("Accordingly, if available state postconviction remedies on their face or as applied offer an '[in]adequate corrective process for the hearing and determination of claims of violation of federal constitutional guarantees,' it is counsel's obligation to argue the point in state postconviction proceedings at the trial level or

key cases, *Wiggins v. Smith*[63] and *Miller-El v. Cockrell*,[64] conducted an in-depth analysis of the state court factual findings. In both cases, the Court found state court rulings to be objectively unreasonable based on the entirety of the state court record. In granting relief in both cases, the Court's evaluation of the factual evidence presented during the state court proceedings demonstrated the unreasonableness in those proceedings in evaluating ineffective assistance of counsel and racially improper peremptory challenges, respectively.[65] The Court determined a level of deference usually applied under § 2254(d)(1) was not the same as under a factual evaluation.[66] While a deferential evaluation still applies, the ability to assess the state factual determinations permits broader evaluation than the strictures of § 2254(d)(1).

B. What's wrong with deference?

Numerous federal judges and scholars have written about the problems with the AEDPA's deference standard. A main criticism is its inability to fix the state court's failure to abide by federal law when interpreting constitutional violations. Included in this discussion is the lack of proper factual development as intended by the AEDPA. Another concern is the inability of federal courts to ensure that state courts correctly apply federal law when deference applies. The Supremacy Clause necessitates that state court rulings that misapply federal law should be overturned. However, the deference standard prohibits federal courts from correcting an improper state court ruling unless it is unreasonable to the extent that fairminded jurists would disagree. The interplay of these two provisions demonstrate why § 2254(d) improperly undermines the original intent of the Great Writ.

1. The State Court Inability to Apply Federal Law Correctly

The AEDPA provided two key provisions to allow state courts the first opportunity to correct any constitutional defects in an inmate's conviction. First, before an inmate may file her federal habeas corpus

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whenever inadequacies in the process become apparent and in all subsequent state court appeals." (alteration in original) (footnotes omitted)).

63. 539 U.S. 510, 534–38 (2003) (considering an ineffective assistance of counsel claim for the penalty phase of a capital trial).

64. 537 U.S. 322, 322 (2003) (reviewing a *Batson* claim of juror strikes based on race).

65. *Wiggins*, 539 U.S. at 535; *Miller-El*, 537 U.S. at 347–48.

66. *See Wiggins*, 539 U.S. at 528–29; *see also Miller-El*, 537 U.S. at 357–59, 357 n.2.

petition, she must have submitted the constitutional claim to the state court in either direct appeal or post-conviction to exhaust it.[67] Exhaustion is required for all constitutional claims unless an inmate demonstrates that the state system does not provide a means for substantive review.[68] The vast majority of states provide some type of mechanism for such review.[69] Federal habeas jurisprudence emphasizes the need to exhaust all claims before presenting them in federal court as a show of respect or comity, thus allowing the state the first opportunity to fix any constitutional errors.[70] However, whether those procedures work is another matter.

Second, the AEPDA restricted access to an evidentiary hearing if one had been sought or should have been requested in state collateral proceedings. An inmate must demonstrate his diligence in pursuing factual development in state proceedings.[71] Without proof of asking for but being denied the opportunity to present the evidence at a hearing, an inmate will be precluded in federal court.[72] Given *Pinholster's* restriction of federal review to state proceedings, the AEPDA strengthens the mandate for factual development to occur in the state courts.[73]

The federal habeas jurisprudence's impetus to defer to state rulings is built on the premise that the state will provide an inmate the ability to develop the factual basis in his constitutional claims and substantively address any faults with his state court convictions.[74] Therefore, restricting federal habeas corpus under that framework makes sense. However, in practice, that is not what occurs. Inmates, who are predominately acting pro se throughout state and federal proceedings, are unable to get the discovery or factual development from state courts. As discussed below, state courts through design and practice are ill-equipped to handle constitutional claims in accordance with federal law.

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67. 28 U.S.C. § 2254(b)(2) (2012).

68. 28 U.S.C. § 2254(b)(1)(B); *see also* Murphy, *supra* note 19, at 723.

69. *See* 1 HERTZ & LIEBMAN, *supra* note 56, § 3.5(a)(6), at 224 (noting that "[a]ll States provide some form of postconviction review").

70. *See* Picard v. Connor, 404 U.S. 270, 277–78 (1971) (noting exhaustion requires that "the substance of a federal habeas corpus claim must first be presented to the state courts" and the claim may be the same "despite variations in the legal theory or factual allegations urged" in support of the claim); *see also* Rose v. Lundy, 455 U.S. 509, 520–22 (1982), *superseded by statute*, Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214; Wainwright v. Skyes, 433 U.S. 72, 80 (1977).

71. 28 U.S.C. § 2254(e).

72. *Id.*

73. *See supra* notes 47–50 and accompanying text discussing Cullen v. Pinholster, 563 U.S. 170, 181–82 (2011).

74. *See* Marceau, *supra* note 22, at 118–19.

a. State structural problems

One of the main difficulties facing inmates raising various constitutional challenges to their conviction is the lack of representation. While there has been a plethora of research and commentary on the deficiencies of trial counsel, these problems are exacerbated in direct appeal, and state collateral proceedings.[75] The Sixth Amendment mandates effective assistance of counsel from the trial phase through the first appeal, called direct appeal.[76] However, the right to counsel ends afterwards. There is no right to counsel in state post-conviction and federal habeas corpus.[77] Even if a state court provides counsel in collateral appeals, there is no remedy if the attorney is ineffective. For that reason, many states court rules do not provide counsel after the first appeal.[78]

Without counsel, inmates must investigate, locate documents and physical evidence, and draft pleadings from their jail cells.[79] Further, they are expected to abide by complicated state rules regarding the form and substance of their pleadings.[80] When an inmate raises a *Brady* claim or some other challenge considered as official misconduct, he may have some evidence gleaned from state open records provisions or located from other investigation. However, this inmate is dependent on the state system to provide the means and opportunity to develop his claim. Also, he must do so at the first opportunity to preserve the claim in federal habeas corpus, but more importantly, to gain relief on the valid constitutional violation.[81]

Another problem plaguing state court adjudications is state court judges who are disinclined to properly vet constitutional claims.[82] Often,

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75. *See* Daniel Givelber, *The Right to Counsel in Collateral, Post-Conviction Proceedings*, 58 MD. L. REV. 1393, 1395 (1999).

76. *Id.* at 1393.

77. *Id.*

78. *See* 28 U.S.C. § 2254(i) (2012); Trevino v. Thaler, 133 S. Ct. 1911, 1917–18 (2013); Bright, *supra* note 33, at 8; *see also* Eve Brensike Primus, *A Crisis in Federal Habeas Law*, 110 MICH. L. REV. 887, 900 (2012) (book review).

79. *See* Tiffany R. Murphy, *"But I Still Haven't Found What I'm Looking For": The Supreme Court's Struggle Understanding Factual Investigations in Federal Habeas Corpus*, 18 U. PA. J. CONST. L. 1129, 1163–64 (2016).

80. *See* Dolan, *supra* note 31, at 50–51.

81. *See generally* Wolff v. McDonnell, 418 U.S. 539, 579 (1974); O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999) (discussing the importance of constitutional claims in federal habeas corpus and why they must be litigated properly through state collateral proceedings before entering federal habeas corpus).

82. Adelman, *supra* note 39, at 388–89 ("For other reasons too, state courts are not well

a state process designates the trial court judge who either took the plea or presided over the trial to also handle the collateral process.[83] There is often not an automatic appointment of an independent adjudicator for these hearings due to the need for judicial economy.[84] Such judges may have a cognitive bias against an inmate asserting claims of police and prosecutorial misconduct given their preconceived notions about the case.[85] Further, many state court judges are often former prosecutors who are disinclined to find fault against their colleagues.[86] "Indeed, studies suggest that state habeas proceedings fail to adequately remedy constitutional errors occurring at the trial level."[87] "For example, a Texas study concluded that state post-conviction decisions were primarily copied verbatim from government briefs in 83.7% of state habeas cases."[88] Such failure to properly substantively review constitutional claims deprives inmates of the full and fair consideration the Great Writ intended.

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positioned to decide the constitutional claims of state prisoners. State court judges receive less training in federal constitutional law than their federal counterparts and face federal constitutional issues less often. Federal judges receive a great deal of education about such issues both when they take the bench and on an ongoing basis. For example, they regularly attend workshops about the past term's Supreme Court decisions. They also have two to four law clerks who are usually among the brightest members of their law school classes. State court judges receive less training, have less staff, and often have to face long daily calendars.").

83. *See* Tran v. Lockhart, 849 F.2d 1064, 1067–69 (8th Cir. 1988); Armstead v. Scott, 37 F.3d 202, 207–08 (5th Cir. 1994).

84. *See generally* 1 HERTZ & LIEBMAN, *supra* note 56, § 3.5(a)(6), at 224 ("In many States, a petition for postconviction relief is filed in a trial-level state court, where an evidentiary hearing may be held on any claims that require factfinding."); Rachel G. Cohen & Krista A. Dolan, *Drowned out without Discovery: Post-Conviction Procedural Inadequacy in an Era of Habeas Deference*, 1 CRIM. L. PRAC. 5 (2013) (discussing how the trial judge handles discovery in state post-conviction proceedings); State v. Prince, 772 P.2d 1121, 1124 (Ariz. 1989).

85. Mary Nicol Bowman, *Mitigating Foul Blows*, 49 GA. L. REV. 309, 318 (2015) (discussing how cognitive bias research illustrates the high incidents of prosecutorial misconduct and courts inability to properly address these constitutional claims).

86. *See* Radley Balko, *The Untouchables: America's Misbehaving Prosecutors, and the System That Protects Them*, HUFFINGTON POST (Aug. 1, 2013, 2:18 P.M.), http://www.huffingtonpost.com/2013/08/01/prosecutorial-misconduct-new-orleans-louisiana_n_3529891.html (discussing the difficulties facing the legal system in prosecuting prosecutorial misconduct).

87. Hartung *supra* note 59; *see also* Jake Sussman, *Unlimited Innocence: Recognizing an "Actual Innocence" Exception to AEDPA's Statute of Limitations*, 27 N.Y.U. REV. L. & SOC. CHANGE 343, 366 n.104 (2001-2002) (listing empirical studies of states that affirmed convictions of actually innocent defendants).

88. Hartung, *supra* note 59; *see also* Marceau, *supra* note 22, at 100–04 (discussing the decreasing number of state inmates obtaining relief after the AEDPA took effect: "But the grace period appears to be over. The data reflected in Tables 1 and 2, although not conclusive, are usefully predictive of a downward trend in the rate of success for state prisoners in the Supreme Court, and it seems likely that as the rate of success in the Supreme Court diminishes, lower courts seeking to avoid reversal will also become more parsimonious with grants of relief to habeas petitioners.").

Additionally, allowing state courts to rely on summary denials for either direct appeal or collateral rulings as a merits review undermines the state court comity argument. As an inmate is entitled to full and fair process in state court, the lack of an opinion deprives both state and federal courts the power to review the constitutionality of these decisions. There is no means by which an inmate, much less a federal judge, would be able to ascertain whether that ruling is "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court."[89] California often summarily denies collateral cases without any opinion.[90] While the Supreme Court ordered federal courts to give these summary denials deference,[91] it unduly binds inmates with viable claims to any critical evaluation in federal habeas proceedings.

Consider this hypothetical: an inmate raises a Fourteenth Amendment substantive due process claim because a prosecutor failed to disclose fingerprint reports establishing a third party's, not the inmate's, prints were on the murder weapon. Such evidence is exculpatory to the inmate. However, more factual development and legal argument may be necessary during state post-conviction to establish whether the withheld evidence was material. Put another way, the inmate must show if the fingerprint evidence prejudiced him at trial potentially resulting in a lesser sentence or a not guilty finding. If the state post-conviction court summarily denies the inmate's petition and on appeal, the state supreme court follows suit, the inmate received no actual discussion of the merits of his constitutional claim for a federal court to assess.

When the inmate arrives in federal habeas corpus proceedings, the federal district court must determine whether there was a reasonable basis for the state court's decision. Specifically, under *Richter*, the federal court must consider whether, "'fairminded jurists could disagree' on the correctness of the state court's decision."[92] So long as the state court's ruling had some legal basis, deference must be given regardless of whether the federal court disagrees or potentially believes the constitutional claim may have merit.[93] *Pinholster* restricts the federal court even further by limiting its review to a non-existent state court

89. 28 U.S.C. § 2254(d)(1) (2012).

90. Hartung, *supra* note 59, at 33–34 ("Yet given that many states, such as California, deny thousands of habeas petitions per year through summary dispositions, it is impossible to determine how often state courts determine the facts or interpret the law in an unreasonable manner.").

91. Harrington v. Richter, 562 U.S. 86, 99 (2011).

92. *Id.* at 101; *see also* Biale, *supra* note 35, at 1340.

93. *See* Dolan, *supra* note 31, at 53.

record.[94] The inmate with the exculpatory fingerprint report faces additional obstacles in asking for either discovery or an evidentiary hearing to prove the viability of his Fourteenth Amendment claim.[95]

A state court's failure to apply federal court law in any meaningful fashion not only creates difficulty in applying the AEDPA as intended, but also undermines the Great Writ. The original intent of the Writ was to have federal courts oversee state court processes and procedures as they interpret federal jurisprudence. Now, federal courts must abdicate their power to state courts when considering whether federal law has been properly interpreted. Such a shift is problematic because it infringes on the Supremacy Clause.

b. Does Deference Infringe on the Supremacy Clause?

The Supremacy Clause mandates that all federal courts review state court decisions to ensure that states, "treat federal law as the 'Supreme Law of the Land'" and overturn any state law that acts contrary to it.[96] The fundamental role of federal courts is to ensure the proper interpretation of federal law and precedent. The Great Writ, as originally intended, coincided with this principle by ensuring state convictions did not violate the Constitution related to either guilt or sentencing.[97] This framework ensured that federal courts could review state court decisions properly and in accordance with federal law. The deference provision undermines the Supremacy Clause because it forces federal courts to uphold convictions with constitutional violations that may conflict with existing Supreme Court precedent. Specifically, as federal courts assess the substantive decisions by state courts—who are supposed to correctly interpret federal law—federal courts are no longer able to overturn state court errors on the merits.[98] Instead, federal courts are impotent to

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94. *See supra* notes 48–51 and accompanying text discussing Cullen v. Pinholster, 563 U.S. 170, 181–82 (2011).

95. *See generally* Marceau, *supra* note 22, at 113 ("The *Brady* right may be heroic in form, but the modern interpretations of AEDPA make *Brady* meek in function. The Ninth Circuit concluded that there was little doubt 'Valdovinos's Brady rights were violated' but nonetheless held that, because federal review is constrained by § 2254(d), the petitioner was not 'entitled to habeas relief.' The point is, even as to the most sacrosanct of the constitutional criminal procedure rights, under AEDPA, the duty of constitutional enforcement is largely delegated to the state courts.").

96. 2 HERTZ & LIEBMAN, *supra* note 56, § 32.5, at 2009 (citing U.S. CONST. art. VI, cl. 2).

97. *See* Bright, *supra* note 34.

98. *See* Chen, *supra* note 39, at 541 ("[I]f this interpretation prevails, § 2254(d)(1) raises serious constitutional questions about Congress's authority to establish federal jurisdiction over federal habeas claims while simultaneously limiting the legal standard of review those courts may exercise in examining whether a prisoner is being held in violation of the Constitution.").

address these incorrect applications of federal law. Ninth Circuit Court of Appeals Chief Judge Alex Kozinski speaks to the conflict in abiding by the deference provisions in cases where the state courts misapplied federal law:

> We now regularly have to stand by in impotent silence, even though it may appear to us that an innocent person has been convicted. Not even the Supreme Court may act on what it believes is a constitutional violation if the issue is raised in a habeas petition as opposed to on direct appeal. There are countless examples of this, but perhaps the best illustration is *Cavazos v. Smith*, the case involving a grandmother who had spent 10 years in prison for the alleged shaking death of her infant grandson—a conviction secured by since-discredited junk science. My court freed Smith, but the Supreme Court summarily reversed (over Justice Ginsburg's impassioned dissent) based on AEDPA.
>
> AEDPA is a cruel, unjust and unnecessary law that effectively removes federal judges as safeguards against miscarriages of justice. It has resulted and continues to result in much human suffering. It should be repealed.[99]

Cavazos v. Smith is a prime example of form over substance as the Ninth Circuit considered the state court's application of *Jackson v. Virginia* concerning the sufficiency of the evidence necessary for a criminal conviction.[100] The state court convicted and affirmed Smith's case based solely on flawed forensic science rulings.[101] Shirley Smith, grandmother of the 7-week-old victim, was convicted under the prosecution's theory of Shaken Baby Syndrome (SBS) and sentenced to fifteen years to life imprisonment.[102] The California state courts denied relief after finding that there was sufficient evidence to support the conviction.[103]

When Smith filed her federal habeas corpus petition, she renewed her constitutional challenge to her conviction based on the insufficiency of the evidence.[104] Specifically, she argued that the evidence presented

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99. Alex Kozinski, *Criminal Law 2.0*, 44 GEO. L.J. ANN. REV. CRIM. PROC. iii, xli–xlii (2015) (footnotes omitted).

100. Cavazos v. Smith, 565 U.S. 1, 6–7 (2011); Jackson v. Virginia, 443 U.S. 307, 319, 326 (1979).

101. *See Cavazos*, 565 U.S. at 6.

102. *Id.* at 5–6.

103. *Id.*

104. *Id.*

could not establish that the victim died from SBS.[105] The federal magistrate agreed that there were serious issues with the California state rulings, that "'[t]his is not the typical shaken baby case[,]' and that the evidence against Smith 'raises many questions.'"[106] However, both the magistrate and district court judge found that the evidence was sufficient to support the conviction acknowledging the deference owed the state court decision.[107]

The Ninth Circuit overturned the district court's opinion on the grounds that the state courts failed to properly apply *Jackson v. Virginia*, standard for sufficiency of the evidence.[108] The Circuit Court discussed the deference owed to the state court ruling but found California Supreme Court's ruling an unreasonable application of federal precedent.[109] The U.S. Supreme Court overturned the Circuit on its failure to abide by the high deference standard of the AEDPA without any discussion of the flawed scientific evidence used by the prosecution.[110] In other words, the federal district court, the Ninth Circuit Court of Appeals, and three Supreme Court Justices expressed grave concerns as to whether the state's evidence against a grandmother was sufficient beyond a reasonable doubt to support her potential life sentence. Yet the Court's majority holding reinforces that federal courts may not second-guess state courts' decisions despite their questionable application of federal law.[111] Smith's case is not an anomaly. Instead, it is the norm for inmates with strong constitutional challenges to their convictions struggling against cursory review in state proceedings.

The deference standard usurps the ability of federal courts to ensure the proper interpretation of federal laws by state courts. Federal courts may only overturn a state court's merit decision when it is unreasonable, not when it misapplies federal law. This distinction unconstitutionally restricts federal courts from conducting the review intended by the habeas statute. As *Cavazos v. Smith* illustrates, when a prosecution rests

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105. *Id.*

106. *Id.* at 6.

107. *See id.*

108. *See id.* at 6–7 (citing Smith v. Mitchell, 437 F.3d 884, 890 (9th Cir. 2006)).

109. *Id.*

110. *Cavazos*, 565 U.S. at 9.

111. *See id.* at 8 ("In light of the evidence presented at trial, the Ninth Circuit plainly erred in concluding that the jury's verdict was irrational, let alone that it was unreasonable for the California Court of Appeal to think otherwise. Doubts about whether Smith is in fact guilty are understandable. But it is not the job of this Court, and was not that of the Ninth Circuit, to decide whether the State's theory was correct. The jury decided that question, and its decision is supported by the record." (citations omitted)).

on dubious evidence to convict someone, and state courts conduct a cursory review, federal courts are now impotent to correct it. In these cases, it is imperative that federal courts, at all levels, evaluate whether the factual grounds raised support granting the writ.

III. OFFICIAL MISCONDUCT: SUBSTANTIVE DUE PROCESS VIOLATIONS UNDER THE DEFERENCE STANDARD.

Fourteenth Amendment Substantive Due Process claims raised in federal habeas corpus primarily deal with either police or prosecutorial misconduct. These claims usually involve problems with interrogations, discovery disclosures, and improper argument by state actors. Such violations often require significant investigation or fact development to satisfy various constitutional elements warranting relief. Because an inmate is challenging state actors, state courts give the benefit of the doubt to state officials.[112] Therefore, such claims are harder to prove than other constitutional challenges in state proceedings. Federal habeas proceedings have been a haven for these issues.

A. What is Official Misconduct?

The most common misconduct claim is the failure of the prosecution to disclose exculpatory or impeachment evidence under *Brady v. Maryland*.[113] *Brady* and its progeny focus on the prosecutor's independent obligation to locate and disclose evidence favorable to the accused prior to trial.[114] A defendant is not required to request this information as a prerequisite for the prosecutor's obligation.[115] For an inmate to prove a *Brady* claim, he must first show that the prosecution had the evidence either in their possession or in law enforcement's control.[116] Second, the inmate must demonstrate that the evidence was not disclosed to the defense pretrial or during trial at the latest.[117] Finally, the inmate must show that the evidence is material, establishing a "reasonable probability" of a different result.[118] Materiality requires an

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112. *See generally* Bowman, *supra* note 85.

113. 373 U.S. 83, 89–91 (1963).

114. *See id* at 87; *see also* Kyles v. Whitley, 514 U.S. 419, 432–41 (1995); United States v. Bagley, 473 U.S. 667, 674–77 (1985); Giglio v. United States, 405 U.S. 150, 153–55 (1972).

115. *See* United States v. Agurs, 427 U.S. 97, 107 (1976).

116. *See Kyles*, 514 U.S. at 421–22.

117. *See id.*

118. *Bagley*, 473 U.S. at 682.

inmate to demonstrate actual prejudice from the failure to turn over evidence. An inmate must explain how his case at trial would have been different had he possessed the withheld evidence. A reviewing court must then evaluate the withheld evidence cumulatively as it weighs the evidence originally presented at trial.[119]

Brady violations are often raised in habeas petitions but are the most difficult to factually prove. An inmate or his counsel must have found the evidence that was not disclosed in the pretrial or trial proceedings. Further, an inmate must articulate how this evidence creates a reasonable probability of a different result. It is on this third prong that most challenges fail. Without additional discovery, either on direct appeal or state collateral proceedings, it is, first, hard to find proof—either in documents or physical evidence—that the police or prosecution failed to disclose. Second, explaining how an inmate's trial attorney would have changed strategy, impeached a witness, or called additional witnesses can be difficult for an inmate representing himself pro se. When state processes summarily or cursory review such claims, the merits determination is suspect heading into federal habeas corpus proceedings. For these reasons, these claims are more likely to obtain relief under § 2254(d) if viable, as will be discussed below.[120]

Brady challenges are often brought in federal habeas corpus petitions. Further, federal precedent is extensive in its application and granting of relief. Therefore, federal courts are more comfortable handling these types of official misconduct claims. However, such claims are just the tip of the iceberg of what can be considered official misconduct. Federal courts are often unlikely to find state court rulings unreasonable for other forms of official misconduct. Some of the typical challenges brought for police misconduct are based on *Miranda v. Arizona*[121] for failing to provide notice of the right to remain silent or the right to counsel, or continuing an interrogation once a suspect asks for an attorney. The veracity of confession may also be challenged, as seen in the *Milke* case.[122]

Prosecutorial misconduct arises in as numerous circumstances as police misconduct. Besides *Brady* violations, there can be numerous

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119. *Kyles*, 514 U.S. at 436–37.

120. *See infra* Section III.B.

121. 384 U.S. 436 (1966).

122. *See* Milke v. Schriro, CV-98-0060-PHX-RCB, 2006 U.S. Dist. LEXIS 86708, at *13 (D. Ariz. Nov. 27, 2006) (claiming interrogation tactics violated Milke's Fifth, Sixth, Eighth, and Fourteenth Amendment rights), *rev'd sub nom.* Milke v. Ryan, 711 F.3d 998 (9th Cir. 2013).

Fourteenth Amendment claims, including improper argument,[123] failure to correct knowingly false testimony,[124] and voir dire claims,[125] among others.[126] Given the close relationship between police and prosecutors, there is often overlap in the factual bases of these types of constitutional claims. Like *Brady* violations, it is often difficult for an inmate to substantiate his official misconduct claim because of the power differential between himself and the state actors involved. Police and prosecutors determine whether to arrest, charge, prosecute, and what evidence—in terms of witnesses and exhibits—will be used against a defendant. This power differential makes it hard for an inmate to successfully assert his constitutional violations the further along in the appellate process the case proceeds.

B. Official Misconduct's Treatment under the AEDPA's Deference Standard.

Prior to *Richter* and *Pinholster*, federal courts carved out an exception under the deference standard for *Brady* claims involving official misconduct in two instances: first, when the evidence was first uncovered in federal habeas, and second, if the evidence was partially uncovered in state collateral proceedings and the remainder was uncovered in federal proceedings. The *Brady* precedent and its progeny span back to the 1950s and put state courts on notice of what is expected under the Fourteenth Amendment. Additionally, the state court process may be critiqued by federal courts more freely when the claim warrants relief. This section discusses how various federal courts have dealt with this area of official misconduct and why it should be expanded to encompass other improper actions.

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123. *See generally* Ryan Patrick Alford, *Catalyzing More Adequate Federal Habeas Review of Summation Misconduct: Persuasion Theory and the Sixth Amendment Right to an Unbiased Jury*, 59 OKLA. L. REV. 479 (2006) (evaluating the effect on the criminal justice system and federal habeas corpus when prosecutors' improper comments during opening statement and closing argument deprive someone of a right to a fair trial).

124. *See* Napue v. Illinois, 360 U.S. 264, 269 (1959) (finding unconstitutional a prosecutor failing to correct knowingly false testimony from witness regarding prosecutor's promise of consideration).

125. *See, e.g.*, Batson v. Kentucky, 476 U.S. 79, 88 (1986) (finding unconstitutional a prosecutor using peremptory challenges to strike jurors based on race).

126. *See* Kelly Puente & Tony Saavedra, *In Rare Move, Judge Kicks Orange County D.A. off Case of Seal Beach Mass Shooting Killer Scott Dekraai*, ORANGE COUNTY REG. (Mar. 13, 2015, 12:55 PM), http://www.ocregister.com/2015/03/13/in-rare-move-judge-kicks-orange-county-da-off-case-of-seal-beach-mass-shooting-killer-scott-dekraai/ (discussing the Orange County District Attorney Office's use of jailhouse informants against defendants).

1. Evidence uncovered during federal habeas corpus proceedings.

Familiarity with *Brady* claims made it easier for both inmates and federal courts to explain the withheld evidence and its impact on the entirety of a case. Before *Pinholster*, habeas courts were comfortable with granting discovery and evidentiary hearings where inmates explained lapses in the state court system impairing their ability to present evidence.[127] Several circuit courts of appeal found a de facto unreasonable application of federal law when additional evidence corroborated these substantive due process claims.[128] Such additional evidence did not automatically result in a writ being granted in these cases but merely the opportunity for the inmate to obtain the evidence that should have been given in state proceedings.[129] When courts did find that additional habeas evidence negated the deference review, these courts conducted a *de novo* review of the claim.[130]

The Fourth Circuit Court of Appeals applied this principle in a few cases. In *Monroe v. Angelone*, the federal district court granted both discovery and an evidentiary hearing where Monroe developed additional evidence on her *Brady* claim.[131] Monroe amended her habeas petition to include new facts showing police notes containing exculpatory evidence.[132] The Court held that where new evidence was developed in federal habeas proceedings, deference did not apply and the Court should review the claim *de novo*.[133] This reasoning focused on the

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127. *See* Monroe v. Angelone, 323 F.3d 286, 297–98 (4th Cir. 2003) (citing Rojem v. Gibson, 245 F.3d 1130, 1140 (10th Cir. 2001)) ("Pursuant to this doctrine, AEDPA's deference requirement does not apply when a claim made on federal habeas review is premised on *Brady* material that has surfaced for the first time during federal proceedings."); *see also* Cargle v. Mullin, 317 F.3d 1196, 1206–07 (10th Cir. 2003) (holding that AEDPA's standard of review does not apply when new issues are considered on federal habeas review); Daniels v. Lee, 316 F.3d 477, 487 (4th Cir. 2003) ("[Because] the evidence on which [the federal claim] is premised was only discovered [after the conclusion of state court proceedings,] . . . [the claim] does not trigger the deference mandate of AEDPA."); Killian v. Poole, 282 F.3d 1204, 1207 (9th Cir. 2002) ("AEDPA deference does not apply to [a] claim [when] . . . [e]vidence of the [claim] . . . was adduced only at the hearing before the [federal] magistrate judge."); Williams v. Coyle, 260 F.3d 684, 706 (6th Cir. 2001) ("Our review of [the] *Brady* claim will be under pre-AEDPA standards because no state court reviewed the merits of that claim.").

128. *See Monroe*, 323 F.3d at 297–98 (Fourth Circuit); *Williams*, 260 F.3d at 706 (Sixth Circuit); *Killian*, 282 F.3d at 1208 (Ninth Circuit); *Cargle*, 317 F.3d at 1206–07 (Tenth Circuit).

129. *See Monroe*, 323 F.3d at 297–98; *Cargle*, 317 F.3d at 1206–07; *Killian*, 282 F.3d at 1208; *Williams*, 260 F.3d at 706.

130. *See, e.g.*, *Monroe*, 323 F.3d at 297–98.

131. *See id*. at 296.

132. *See id.*

133. *See id.* at 297.

lack of a state court ruling to evaluate deferentially.[134] Explained another way, because the state court did not rule on this evidence, or potentially provide means for its development, there was nothing for which a federal court must defer. This rationale applied to a few cases where inmates were successful in obtaining a writ of habeas corpus.[135] However, *Pinholster* ended this practice to provide inmates an avenue to fully develop claims that were improperly curtailed in state court. Thus, valid claims of official misconduct go unrectified.

2. Evidence uncovered late in state post-conviction or after state court.

Even in situations where the evidence was uncovered completely in state post-conviction, the deference standard did not result in a guaranteed denial of relief.[136] Instead, courts were comfortable with weighing the state court's adjudication during either direct appeal or post-conviction, ensuring deference did not trump valid claims.[137] After the *Pinholster* decision, what little ambiguity that lingered with deference was eliminated. While federal courts grappled with the additional restrictions under *Pinholster* and later *Richter*, Justice Sotomayor discussed the potential for undue harm to inmates who possessed valid Fourteenth Amendment claims but were restricted in their ability to present the factual support through no fault of their own.[138] Those inmates unable to prove their state court rulings either

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134. *See id.*

135. *See* Wolfe v. Clarke, 691 F.3d 410, 423–26 (4th Cir. 2012) (*Monroe* rationale used to support an actual innocence and *Brady* claim); Winston v. Pearson, 683 F.3d 489, 507 (4th Cir. 2012) (granting relief where evidence of mental retardation was first presented in federal habeas corpus).

136. *See generally* Jones v. Bagley, 696 F.3d 475 (6th Cir. 2012); Montgomery v. Bobby, 654 F.3d 668 (6th Cir. 2011); Wisehart v. Davis, 408 F.3d 321 (7th Cir. 2005).

137. *See* Harris v. Lafler, 553 F.3d 1028, 1033–35 (6th Cir. 2009) (affirming grant of a conditional writ of habeas corpus where the prosecution withheld impeachment evidence affecting the credibility of a witness, despite the § 2254(d)(1) deference standard, because the state court failed to address the third element of *Brady* concerning materiality or actual prejudice); *see also* Barker v. Fleming, 423 F.3d 1085, 1095 (9th Cir. 2005) (affirming denial of the writ of habeas corpus despite concluding that AEDPA's deferential standard did not apply "[b]ecause the state court did not conduct the proper [*Brady*] analysis").

138. *See* Cullen v. Pinholster, 563 U.S. 170, 212–15 (2011) (Sotomayor, J., dissenting). Justice Sotomayor's dissent illustrates a common problem facing inmates who had valid constitutional claims but were thwarted in their efforts to comply with state collateral procedures. Because state post-conviction proceedings may not allow for discovery, it takes inmates much longer to find the factual predicate of their official misconduct claim. As Justice Sotomayor explained:

> We have long recognized that some diligent habeas petitioners are unable to develop all of the facts supporting their claims in state court. As discussed above, in enacting AEDPA, Congress generally barred evidentiary hearings for petitioners who did not

contained both procedural defaults and merits determination, thereby giving them an argument against § 2254(d)'s application, found themselves caught in a quagmire being unable to return to state court for relief and restricted from that evidence in federal habeas. Many inmates found their claims unable to survive a deference review under such strict guidelines.[139]

While federal habeas corpus jurisprudence lays out that state court decisions should either be on the merits or procedurally barred,[140] state courts often conflate the two standards. When state court opinions invoke both a procedural bar and merits decisions, federal courts could apply procedural bars which were now easier to bypass given the cause and prejudice exception paralleling application to the *Brady* elements.[141]

> "exercise diligence in pursuing their claims" in state court. Importantly, it did not impose any express limit on evidentiary hearings for petitioners who had been diligent in state court. For those petitioners, Congress left the decision to hold a hearing "to the sound discretion of district courts."
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> . . . .
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> Consider, for example, a petitioner who diligently attempted in state court to develop the factual basis of a claim that prosecutors withheld exculpatory witness statements in violation of *Brady v. Maryland*. The state court denied relief on the ground that the withheld evidence then known did not rise to the level of materiality required under *Brady*. Before the time for filing a federal habeas petition has expired, however, a state court orders the State to disclose additional documents the petitioner had timely requested under the State's public records Act. The disclosed documents reveal that the State withheld other exculpatory witness statements, but state law would not permit the petitioner to present the new evidence in a successive petition.
>
> Under our precedent, if the petitioner had not presented his *Brady* claim to the state court at all, his claim would be deemed defaulted, and the petitioner could attempt to show cause and prejudice to overcome the default. If, however, the new evidence merely bolsters a *Brady* claim that was adjudicated on the merits in state court, it is unclear how the petitioner can obtain federal habeas relief after today's holding. What may have been a reasonable decision on the state-court record may no longer be reasonable in light of the new evidence. Because the state court adjudicated the petitioner's *Brady* claim on the merits, § 2254(d)(1) would still apply. Yet, under the majority's interpretation of § 2254(d)(1), a federal court is now prohibited from considering the new evidence in determining the reasonableness of the state-court decision.

Id. (citations omitted).

139. *See, e.g.*, Runningeagle v. Ryan, 686 F.3d 758, 767 (9th Cir. 2012) (holding that the state court ruling on the *Brady* claim was not an unreasonable application of clearly established federal law); *Montgomery*, 654 F.3d at 683 (overturning the federal district court writ of habeas corpus because the state court ruling was not unreasonable).

140. *See* Murray v. Carrier, 477 U.S. 478, 485–86 (1986) (discussing a state procedural bar will be honored in federal habeas corpus if the bar is both adequate and independent), *superseded by statute*, Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections and titles).

141. *See id.*; *see also* Strickler v. Greene, 527 U.S. 263, 282 (1999) ("Because petitioner acknowledges that his *Brady* claim is procedurally defaulted, we must first decide whether that default is excused by an adequate showing of cause and prejudice. In this case, cause and prejudice parallel two of the three components of the alleged *Brady* violation itself.").

For example, in *Barton v. Warden, Southern Ohio Correctional Facility*, the Sixth Circuit Court of Appeals conducted a detailed discussion of the state court proceedings recognizing it was limited to the state court record.[142] The Court explained that the "last state court to issue a reasoned opinion on the issue" in the case, provided a mixed ruling imposing procedural bar and a cursory merits examination.[143] The Court applied the state procedural bar allowing a de novo review of Barton's *Brady* claim that warranted relief.[144]

Federal courts should look to § 2254(d)(2) for official misconduct claims, especially when there is a pattern of malfeasance. Where all the evidence involving police or prosecutorial misconduct is clear from the state court record, the unreasonable application of the facts becomes much more apparent. Such analysis would fit many of the broader types of official misconduct including improper arguments, *Miranda* violations, and false statements to a court. The *Milke* opinion demonstrates a thorough analysis under both subsections of the deference standard in granting relief where a pattern of misconduct occurred.

Very few federal courts conduct an analysis under both subsections of § 2254(d), as the Ninth Circuit Court of Appeals did in the *Milke* case. Such analysis, even after the Supreme Court's rulings in *Richter* and *Pinholster*, provided a means for valid claims to obtain relief. An inmate receives a substantial benefit when a federal court considers the cause through both deferential lenses. The Ninth Circuit's analysis of the claim is quite distinct under both (d)(1) and (d)(2). An examination of the analysis under (d)(2) involves an extensive examination of whether the state court failed to consider all the factual evidence in its record which would entitle Milke to relief:

> The prosecution's suppression of this report in state court distorted the fact-finding process, forcing the state judge to make her finding based on an unconstitutionally incomplete record. . . .
>
> By withholding key evidence that it had a duty to produce, the prosecution induced a defect that causes us to "more than merely doubt whether the process operated properly." We can be certain it didn't. "[A]ny appellate court to whom the defect is pointed out would be

142. *See* 786 F.3d 450, 460 (6th Cir. 2015).

143. *See id.* at 461–62.

144. *See id.*; *see also, e.g.*, Gumm v. Mitchell, 775 F.3d 345, 362 (6th Cir. 2014) (explaining that the state court discussed the merits of Gumm's *Brady* claim, but the state court's opinion stated it lacked jurisdiction on the claim. Therefore, the claim was procedurally barred, allowing the federal courts to review it de novo if the elements of *Brady* were met).

> unreasonable in holding that the state court's fact-finding process was adequate." The state court's finding thus amounted to an unreasonable determination of the facts under section 2254(d)(2).[145]

Under this analysis, the Court is willing to give a presumption of correctness to factual determinations for (d)(2). However, that presumption is overcome based upon a showing of the inadequacy of the evidence as demonstrated here. As demonstrated, the Court found additional faults with the factual assessment conducted by the state court.[146] Such in-depth discussion is vital in official misconduct cases because the facts and the withholding of the facts play such a critical role in the interpretation of deference and the underlying claim itself. Because of the immense power the police and prosecution have in criminal cases, their improper actions deprive inmates of the basis of their claims in a variety of contexts and provides narrow review if only examined under § 2254(d)(1). When systemic official misconduct occurs, or, as in *Milke*, where one actor's misconduct can be demonstrated across several cases, it is unreasonable for federal courts to uphold state court merits decisions that affirm these convictions. Federal courts are in a better position to review such systemic misconduct because they are unencumbered by the limitations that affect state court decisions. Reviewing official misconduct claims under § 2254(d)(2) provides a greater protection of constitutional rights.

IV. MOVING FORWARD

Police and prosecutorial misconduct are garnering more attention by the media, state bars, and courts. Such scrutiny focuses on the extensive power these actors have before charges are brought against an accused[147] or counsel is appointed. As the criminal justice system entrusts prosecutors to seek justice first as they represent their constituents, their actions are now resulting in more accountability by the same.[148] When

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145. Milke v. Ryan, 711 F.3d 998, 1007 (9th Cir. 2013) (alteration in original) (citations omitted) (quoting Taylor v. Maddox, 366 F.3d 992, 1000 (9th Cir. 2004)).

146. *See id.* at 1008–10.

147. *See, e.g.*, H. Mitchell Caldwell, *The Prosecutor Prince: Misconduct, Accountability, and a Modest Proposal*, 63 CATH. U. L. REV. 51, 57–58 (2013) (outlining the powers of the prosecutor).

148. *See* Berger v. United States, 295 U.S. 78, 88 (1935) ("The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."); *see also* CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.2(b) (AM. BAR ASS'N 2015) ("The primary duty of the prosecutor is to seek justice within the bounds of the law, not

official actors abuse their power, federal courts should not be curtailed in their ability to ascertain the extent such abuse violated an inmate's constitutional rights. The prevailing concerns about federal habeas review, namely respecting state court rulings and preserving the finality of convictions, are not as persuasive in this context due to the malfeasance done by state police and prosecutors.

A. Systemic Official Misconduct: Why the impact is greater.

Official misconduct should not proceed under the deference standard due to the systemic impact it has on numerous defendants' constitutional rights. As previously discussed, prosecutors' or police officers' infractions are hard to rectify through a state trial and appellate process for numerous reasons. Longstanding malfeasance by prosecutors' offices impacts a variety of constitutional rights of those accused and convicted of crimes. For inmates to receive objective and full review of their Fourteenth Amendment constitutional challenges during federal habeas requires a more lenient application of the deference standard. Specifically, federal courts should assess the factual record before them, considering how systemic misconduct impacts an inmate's ability to fully present a claim in state court. Included in this review is the question of whether the factual review performed by the state court would be unreasonable given the misconduct.

Several prosecutors' offices have been publicly reprimanded for their consistent misconduct. A prime example is the Orleans Parrish District Attorney's Office, which has a long history of prosecutorial misconduct. This includes three cases before the Supreme Court on egregious *Brady* violations.[149] The Orleans Parrish DA's Office under Harry Connick, Sr. and now Leon Cannizzaro abused its power by withholding exculpatory evidence, threatening witnesses, and making knowingly false statements to judges and juries.[150] Such longstanding abuses existed in that office for over thirty years.[151] However, these abuses are not only found in

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merely to convict.").

149. *See* Wearry v. Cain, 136 S. Ct. 1002 (2016); Smith v. Cain, 565 U.S. 73 (2012); Kyles v. Whitley, 514 U.S. 419 (1995).

150. *See Wearry*, 136 S. Ct. 1002, 1004–05 (prosecutors failing to disclose evidence); *Smith*, 565 U.S. 73, 76 (same); *Kyles*, 514 U.S. 419, 441–42 (same); *see also* Bert, *LA: In New Orleans, DA Cannizzaro Breaks the Bank and the Public's Trust*, THE OPEN FILE BLOG (Feb. 23, 2017), http://www.prosecutorialaccountability.com/2017/02/23/la-in-new-orleans-da-cannizzaro-breaks-the-bank-and-the-publics-trust/; *see generally* Connick v. Thompson, 563 U.S. 51 (2011) (describing abuses in the DA's office under Connick, Sr.).

151. *See Kyles*, 514 U.S. at 421 (noting that Orleans Parrish District Attorney Harry Connick,

New Orleans but are also pervasive through many prosecutor's offices in the state.[152] For the inmates impacted by prosecutorial overreaching, their relief predominately comes in federal habeas corpus proceedings.[153]

The inability of the Louisiana state courts to address these clear federal constitutional violations illustrates the need for more federal court oversight rather than less. Federal courts are aware of the New Orleans Parish District Attorney's Office's habitual failure to disclose evidence. Therefore, when an individual raises a *Brady* violation, he should explain the extent to which discovery was provided pretrial and the police or prosecution's response at trial. Under § 2254(d)(2), the Court could examine the prosecution's systemic misconduct in determining whether the state's factual determination is reasonable. This analysis provides greater protection for the inmate and provides a mechanism for review as statutorily intended.

New Orleans is not an isolated incident. Instead, similar infractions can be seen in other prosecutors' offices like that of Orange County, California, where the district attorney's office had a history of planting jail house informants to provide testimony against defendants.[154] Such misconduct also occurred in numerous cases involving surrounding counties.[155] The Las Vegas District Attorney faced questioning after his

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Sr. held his office at the time of Curtis Kyles's first trial in 1984).

152. *See generally* Della Hasselle & John Simerman, *Questions over Conduct of Louisiana Prosecutors Is Before Supreme Court*, THE LENS (June 12, 2016, 9:51 PM), http://thelensnola.org/2016/06/12/questions-over-conduct-of-louisiana-prosecutors-is-before-supreme-court/ (discussing the number of death sentences overturned due to prosecutorial misconduct and Louisiana prosecutors' history of abuses).

153. *See id.*

154. *See* Paloma Esquivel, *O.C. Murder Conviction Vacated After Jailhouse Snitch Hearings*, L.A. TIMES (June 25, 2014, 3:10 PM), http://www.latimes.com/local/lanow/la-me-ln-oc-murder-conviction-vacated-20140625-story.html ("Dekraai's defense attorneys sought the hearing to prove their allegations that prosecutors and law enforcement for years engaged in a pattern of unconstitutionally deploying jailhouse snitches and routinely concealing their work from defense attorneys."); *see also* Sophie, *CA: Orange County DA Drops Murder Charges to Save Face and Keep Secrets, Attorneys Allege*, THE OPEN FILE BLOG (Oct. 2, 2014), http://www.prosecutorialaccountability.com/2014/10/02/ca-orange-county-da-drops-murder-charges-to-save-face-and-keep-secrets-attorneys-allege/.

155. *See* Tracey Kaplan, *Santa Clara County: Ex-Jailer Says Planting Informants Was Routine*, MERCURY NEWS (Mar. 1, 2015, 7:46 AM), http://www.mercurynews.com/2015/03/01/santa-clara-county-ex-jailer-says-planting-informants-was-routine/ ("A former Santa Clara County Jail official has claimed he routinely helped cops and prosecutors plant jailhouse informants to actively dig up information from suspects for about 10 years ending in the late 1990s, potentially violating a Supreme Court ruling that prevents the government from sending anyone to interrogate defendants without their lawyer being present. . . . In the late 1980s, a scandal over the extensive use of jailhouse informants erupted in Los Angeles County after informant Leslie Vernon White proved how easily he could fake the confession of another inmate. It sparked a grand jury investigation and major reforms, and the use of informants there plummeted.").

history of paying witnesses surfaced. Over a twenty-year period, payments were made through a slush fund for relocating witnesses, paying rent for witnesses, and paying a witness's debts.[156] The Supreme Court has ruled that such evidence must be disclosed to defense counsel as impeachment evidence.[157] However, the Las Vegas District Attorney does not agree that evidence of these payments should be given to defense counsel.[158]

Other prosecutors' offices constitutional violations occurred during the trials themselves when they made improper arguments. Because prosecutors bear the burden of proving the charges against the accused beyond a reasonable doubt, they have the first say during both opening statement and closing argument. Further, they have a rebuttal argument after the defense closing argument. The line between a proper and improper argument is not as blurred as many state courts seem to think they are. Prosecutors are not permitted to shift their burden onto the defense,[159] they may not use a defendant's choice to remain silent as grounds for impeachment,[160] and they are not permitted to argue evidence not introduced in the trial.[161] However, these constitutional violations occur quite frequently because state courts very rarely overturn convictions because of these infractions.[162]

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156. Bethany Barnes, *Vegas DA's Witness Payment Account Remains a Mystery*, LAS VEGAS REV.-J. (Sept. 13, 2014, 8:54 PM), https://www.reviewjournal.com/crime/courts/vegas-das-witness-payment-account-remains-a-mystery.

157. *See* Giglio v. United States, 405 U.S. 150, 154–55 (1972) ("Here the Government's case depended almost entirely on Taliento's testimony . . . . Taliento's credibility as a witness was therefore an important issue in the case, and evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it.").

158. Bethany Barnes, *Public Defender Blasts D.A.'s Take on Witness Rent Pay*, LAS VEGAS REV.-J. (Aug. 21, 2014, 9:42 PM), https://www.reviewjournal.com/local/local-las-vegas/public-defender-blasts-d-a-s-take-on-witness-rent-pay.

159. *See* Engle v. Isaac, 456 U.S. 107, 131–33 (1982) (holding that burden shifting by the prosecution during trial is a colorable constitutional violation, but reversing the Sixth Circuit on procedural grounds).

160. *See* Doyle v. Ohio, 426 U.S. 610, 618 (1976) ("[I]t would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.").

161. *See* Dunlop v. United States, 165 U.S. 486, 498 (1897) (discussing the types of prosecutorial arguments that are impermissible, including discussing evidence not admitted, but finding no impermissible conduct in the instant case).

162. *See* Alford, *supra* note 123, at 483–84, 486 (discussing the deterrent effect on police and prosecutorial misconduct when courts overturn convictions when misconduct occurs but the failure to do so when improper arguments occur). *But see* Rodriguez v. State, 210 So. 3d 750, 757 (Fla. Dist. Ct. App. 2017) (overturning a state court conviction based on the prosecutor's improper closing argument and referring the prosecutor to the state bar).

Ninth Circuit Chief Judge Alex Kozinski acted against what he saw as a prevalent pattern of prosecutorial misconduct. He has consistently spoken about the pervasive problems in the criminal justice system. Many of his concerns rest with the power prosecutors have and the growing abuse he sees in the cases before him:

> But there are disturbing indications that a non-trivial number of prosecutors—and sometimes entire prosecutorial offices—engage in misconduct that seriously undermines the fairness of criminal trials. The misconduct ranges from misleading the jury, to outright lying in court and tacitly acquiescing or actively participating in the presentation of false evidence by police.
>
> Prosecutorial misconduct is a particularly difficult problem to deal with because so much of what prosecutors do is secret. If a prosecutor fails to disclose exculpatory evidence to the defense, who is to know? Or if a prosecutor delays disclosure of evidence helpful to the defense until the defendant has accepted an unfavorable plea bargain, no one will be the wiser. Or if prosecutors rely on the testimony of cops they know to be liars, or if they acquiesce in a police scheme to create inculpatory evidence, it will take an extraordinary degree of luck and persistence to discover it—and in most cases it will never be discovered.[163]

In several cases, Chief Justice Kozinski has questioned and admonished prosecutors who violate various constitutional protections of inmates. In *Baca v. Adams*,[164] he challenged the Assistant Attorney General representing Adams, suggesting that the trial prosecutor should be charged for perjury.[165] He questioned the respondent as to why the Attorney General's Office continued to defend a conviction with such pervasive prosecutorial misconduct including the introduction of knowingly false testimony.[166] Now, more courts are referring

163. Kozinski, *supra* note 99, at xxii–xxiii.

164. 777 F.3d 1034 (9th Cir. 2015).

165. *See* Alec, *CA: AG Harris Drops Appeal in Wake of Judge's Suggestion Prosecutor Be Tried for Perjury*, THE OPEN FILE BLOG (Feb. 1, 2015), http://www.prosecutorialaccountability.com/2015/02/01/ca-ag-harris-drops-appeal-in-wake-of-judges-suggestion-prosecutor-be-tried-for-perjury.

166. *See id.* ("But it is when the argument begins to reaches [sic] its conclusion that things get roughest for the State's lawyer. At 30:11 Kozinski flatly tells the lawyer, 'You will provide this information [about the prosecutorial misconduct] to the Attorney General in the next forty-eight hours,' and soon after tells Vienna to ask her, Kamala Harris, 'if she really wants to stick by a prosecution that was obtained by lying prosecutors.' By thirty-six minutes in, he is telling Vienna that any opinion by the panel would 'not be pretty' for the State, that such an opinion would 'names [sic] names' of state officials, and goes so far as to announce from the bench that the case will not be considered submitted, until the State reports back on whether it has reconsidered the conviction itself.") (alteration in original); *see also* Frost v. Gilbert, 818 F.3d 469, 476–78 (9th Cir. 2016) (naming the prosecutors and their improper actions), *withdrawn and superseded*, 835 F.3d 883 (9th

prosecutors to state bar associations for discipline.[167] The current practice of publicizing and reporting to state bars the malfeasance of prosecutors is crucial because so few courts are taking action to curb this misconduct in individual cases.[168] When prosecutors are unaccountable for their misdeeds, the lack of accountability trickles down to law enforcement, who become lax in their abuses.

Chief Justice Kozinski's recognition of police misconduct mirrors his stance against prosecutorial misbehavior.[169] For example, his majority opinion in the *Milke* case illustrates the flaws in the state court's application of federal constitutional law. There, he described the police malfeasance that occurred during the interrogation of Milke in violation of *Miranda v. Arizona* where warnings were either not given, an invocation to the right to trial was ignored, or there was a question as to the validity of the confession.[170] For Milke, she challenged that the confession ever occurred as Detective Saldate testified it did.[171] Of concern for the court was the failure of the state court to recognize the importance of Detective Saldate's history of disobeying constitutional protections during interrogations, abusing his authority, and being internally reprimanded for his behavior.[172] The court's opinion described the other victims who suffered because of Detective Saldate.[173] Because no substantive actions were taken by his superiors, Detective Saldate continued to abuse his authority in numerous cases. Countless victims' constitutional rights were violated because an officer disregarded the law

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Cir. 2016) (en banc).

167. *See, e.g.*, *Rodriguez*, 210 So. 3d at 757; Bert, *FL: Fear Not, Appeals Court Reverses Conviction and Refers Prosecutor to State Bar*, THE OPEN FILE BLOG (Feb. 21, 2017), http://www.prosecutorialaccountability.com/2017/02/21/fl-fear-not-appeals-court-reverses-conviction-and-refers-prosecutor-to-state-bar.

168. *See* Caldwell, *supra* note 14, at 1456–57 (explaining how prosecutors who commit misconduct are not held accountable for their serious sanctions through license suspension or civil liability, and the resulting convictions are rarely overturned).

169. *See* Kozinski, *supra* note 99, at xxix–xxx (discussing reforms that would limit police misconduct including mandatory recording of interrogations and confessions as well as restricting the use of jailhouse informants).

170. *See* Milke v. Ryan, 711 F.3d 998, 1002 (9th Cir. 2013).

171. *See id*.

172. *See id.* at 1008 ("Milke presented the state court with hundreds of pages of court records from cases where Saldate had committed misconduct, either by lying under oath or by violating suspects' *Miranda* and other constitutional rights during interrogations. Had these cases been brought to the jury's attention, they would certainly have cast doubt on Saldate's credibility. In addition to serving as impeachment evidence, they also buttressed Milke's repeated claim that she'd been prejudiced by denial of access to Saldate's personnel file, where more impeachment evidence could be expected to reside. This trove of court documents was critical to Milke's claim but ignored by the post-conviction court.").

173. *Id.* at 1006–08.

and his ethical obligation. Worse yet, Debra Milke spent years on death row because of his wrongdoing.

Violations of *Miranda* are often unsuccessful for inmates given the difficulties they have in challenging police throughout the criminal justice system. For example, Milke requested evidence throughout her state court proceedings, but was denied.[174] It was only through the efforts of her defense counsel searching court records independently about Saldate's former cases did much of her impeachment evidence come to light.[175] Saldate's abuses spanning several cases were known to his superiors, yet very little was done to protect those charges against his abuses. Besides the battle to have interrogations recorded at the outset[176] the factual predicate without such evidence is limited.

Similarly, the Ninth Circuit found that Sessoms requested an attorney during his interrogation twice before police read him Miranda warnings.[177] The police continued to interrogate him despite his request for legal counsel and their acknowledgment of that request.[178] The court found that the state court's denial of Sessoms' motion for suppression for violating *Miranda* was not entitled to deference due to it being an unreasonable application of Supreme Court precedent.[179] The detectives recorded their interrogation of Sessoms, providing him independent records of what transpired and allowing him to provide the factual basis of precisely how his constitutional rights were violated.[180] While the state courts failed to apply *Miranda v. Arizona* properly, hope was not lost to Sessoms, who obtained relief in federal habeas corpus.[181] However, both cases are anomalies rather than the rule. The ability to provide documents and transcripts established how the state courts erred and provided a means to surpass the deference standard.

Official misconduct is often a systemic violation that impacts numerous inmates based on the failing of the state courts and state actors to hold bad actors accountable. The harms stack against an inmate because state officials exceed the scope of their constitutional authority

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174. *Id.* at 1003–04.

175. *Id.* at 1007–08.

176. *See* Thomas P. Sullivan, *Arguing for Statewide Uniformity in Recording Custodial Interrogations*, 29 CRIM. JUST. 21, 22–25 (2014) (discussing the state-by-state use of recording interrogations).

177. Sessoms v. Grounds, 776 F.3d 615, 625–26 (9th Cir. 2015).

178. *Id.* at 617–19.

179. *Id.* at 625.

180. *Id.* at 629.

181. *See id.* at 631.

toward a defendant during the investigation or prosecution of the case. Their actions affect the ability to raise a viable defense. Further, the state officials inhibit the state courts from properly evaluating the case during the appeals. State court judges fail to see the pattern of misconduct or appreciate its significance under federal law.[182] As the Ninth Circuit held in *Milke*, the pattern of misconduct establishes the unreasonableness of the factual determination of the state court. In such instances, federal habeas corpus is the only means to achieve relief. The next section discusses how federal courts should handle state court merits rulings when dealing with widespread misconduct.

B. The Proper Application of Deference with Systemic Misconduct

Legal scholars have debated how to streamline or adjust federal habeas corpus proceedings to address systemic abuses or patterns of misconduct. By doing so, inmates who are unable to fully articulate the extent of their constitutional violations could shift some of the burden to respondents to answer for their bad behavior. However, many of the suggested changes are flawed because they eliminate an individual's right to relief on official misconduct. Because many of these systemic abuses are known by attorneys and courts, an inmate should be able to raise a constitutional claim by providing this systemic evidence in their federal petition. Given the *Pinholster* restrictions, federal courts should review systematic claims under § 2254(d)(2) assessing whether the state court's factual analysis was unreasonable. The failure of the state court to consider the often longstanding impact of state actors' malfeasance constitutes unreasonable action. This allows federal courts to discuss the overarching misconduct within an individual's federal habeas corpus petition.

A few scholars suggest wholesale changes to federal habeas corpus, including significantly curtailing its application to non-capital defendants[183] or limiting its application to actual innocence claims.[184] Another scholar advocates for streamlining federal habeas corpus by

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182. *See* Miller-El v. Cockrell, 537 U.S. 322, 339–46 (2003) (finding deference under § 2254(d)(2) not appropriate given the systemic *Batson* violations by the prosecutor's office).

183. NANCY J. KING & JOSEPH L. HOFFMANN, HABEAS FOR THE TWENTY-FIRST CENTURY: USES, ABUSES, AND THE FUTURE OF THE GREAT WRIT 91–92 (2011) (proposing a Congressional amendment to limit federal habeas in noncapital cases to (1) convictions based on "newly declarared, but retroactively applied, federal constitutional rule" and (2) "conviction[s] of a probably innocent person in violation of the Constitution").

184. Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 150–51 (1970).

limiting it to addressing systemic violations.[185] However, these viewpoints take away the crux of what federal habeas is, a legal mechanism for state inmates to raise their constitutional claims against their conviction in federal court.[186] Federal habeas corpus must take into account when systemic violations of constitutional rights deprives inmates not only of the ability to factually substantiate their claims, but when they play an integral part as to why they are convicted in the first place. As shown previously, state courts are ill-equipped to handle these claims or choose not to do so. Both the state court process and often the factual basis of the claim are unconstitutionally limited due to state actions. Therefore, it is incumbent upon federal courts to address these claims.

Justice Sotomayor's dissent in *Pinholster* discussed the likelihood that evidence not considered by the state courts in either direct appeal or post-conviction could not be considered when the inmate reaches federal habeas corpus.[187] Evidence fitting within that framework is much more likely to occur in systemic official misconduct cases. In this context, indiscriminate application of the deference standard is problematic because the state court decision, or lack thereof, is an unreasonable application of the facts when compared to the state court record. An inmate lacking resources and deprived of the factual predicate through police or prosecutorial malfeasance, or both, of their constitutional claim necessitates applying a lenient application of § 2254(d)(2) or de novo review.

Under § 2254(d)(2), a federal court must consider the entirety of the state court record involving the facts presented by the petitioner. This requires a thorough examination of not just the specific facts alleged along with the supporting evidence, but the state court process as well.[188] This includes whether the state court held a "full and fair" hearing or made factual determinations if the state court does not hold a hearing.[189] A state appellate and collateral process that lacks fundamental fairness to fully present their official misconduct claims along with the facts

185. Eve Brensike Primus, *A Structural Vision of Habeas Corpus*, 98 CAL. L. REV. 1, 9 (2010).

186. 28 U.S.C. § 2254 (2012).

187. *See* Cullen v. Pinholster, 563 U.S. 170, 213–14 (2011) (Sotomayor, J., dissenting) (stating that new evidence not available in state proceedings but present in federal habeas corpus should be considered under both § 2254(d) and § 2254(e)(2)).

188. *See* Biale, *supra* note 35, at 1342 ("In order to determine whether the state court adjudication led to a decision that involves a reasonable application of federal law, therefore, the federal court should look broadly to the state adjudicative process.").

189. *See* 2 HERTZ & LIEBMAN, *supra* note 56, § 32.4, at 1995, 1995 n.9–11 (discussing the circumstances for when a federal court may grant relief under § 2254(d)(2)).

supporting them is unable to conduct an examination as the AEDPA intended.[190] By providing state courts the first opportunity to remedy problematic convictions, the AEDPA is willing to defer to those rulings provided the state courts reasonably apply federal law. However, this does not happen when police and prosecutors act inappropriately during the pretrial process, adjudication, and beyond conviction. When a state system disregards a federal constitutional provision, it violates the basic purpose of federal judges by restricting their ability to overturn such decisions.[191]

As the Ninth Circuit did in *Milke*, such analysis of how the facts were improperly assessed, including the state's failure to disclose, can result in relief for an aggrieved inmate. Police and prosecutorial misconduct should not be rewarded with deference when an inmate can demonstrate systemic patterns of behavior. This is especially true when a longstanding pattern of misconduct exists. In *Miller-El v. Dretke*, the Supreme Court recognized systemic racial peremptory challenges as part of the (d)(2) analysis resulting in relief.[192] Federal courts should utilize this fact-intensive analysis where the record is clear and inmates can articulate the pattern of wrongdoing.

Allowing the state courts to deny access while shielding errant police and prosecutors not only destroys the credibility of the criminal justice system, but it also signals that constitutional protections are no longer relevant to people improperly convicted. The fact that official misconduct occurred in 52% of exonerations in this country provides an indication of the depths of the problem.[193] When an inmate can explain how official misconduct affects her case but needs some assistance in federal court, deference should not prevent her from doing so. Factual development would not open the floodgates of new cases.[194] Deference

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190. *See* 28 U.S.C. § 2254(b)(1)(A) (2012) (requiring exhaustion of all constitutional claims and the facts supporting those claims in state court prior to submitting them in federal court); *see also* Murray v. Carrier, 477 U.S. 478, 488–89 (1986).

191. *See supra* Section II.B.1.b (discussing Supremacy Clause); *see also* Kozinski, *supra* note 99, at xlii.

192. 545 U.S. 231, 236–37 (2005).

193. *See Contributing Factors and Type of Crime*, NAT'L REGISTRY OF EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx (last visited Oct. 2, 2017) (The National Registry of Exonerations includes "information about every known exoneration in the United States since 1989.").

194. *See* Amado v. Gonzalez, 758 F.3d 1119, 1136 (9th Cir. 2014) ("Under § 2254(d)'s unreasonable determination clause, 'a federal court may not second-guess a state court's fact-finding process unless, after review of the state-court record, it determines that the state court was not merely wrong, but actually unreasonable.'").

would still apply but not stand in direct opposition to the overarching goal of the Great Writ.

V. CONCLUSION

Police and prosecutorial misconduct occurs more often than most people realize. When it does happen, it affects countless defendants who may be innocent, have viable defenses to their charges, or—at minimum— deserve their honest day in court. Yet, when police refuse to stop questioning a suspect after they ask for an attorney or a prosecutor makes an inappropriate argument during a trial, state courts may disregard these federal constitutional safeguards with little concern for its implications. Federal habeas corpus, once the ultimate check against state indifference has become a rubber stamp for state court decisions. Deference should not trump a valid constitutional violation when an inmate can show how a police or prosecutor acted inappropriately. A justice system that allows it to do so makes constitutional protections meaningless.